IN THE

Supreme Court of the United States

October Term, 1963

No. 216

S. ROBERT TRALINS, for himself and "PLEASURE WAS MY BUSINESS" as a book,

Petitioner,

vs.

RICHARD E. GERSTEIN, as State Attorney,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, STATE OF FLORIDA

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as a book,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, STATE OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the District Court of Appeal, Third District, State of Florida, entered in the above-entitled cause on March 19, 1968 and made final, upon the denial of the petition for rehearing, on April 8, 1968.

OPINIONS BELOW

The opinion of the Florida District Court of Appeal denying petitioner's and respondent's interlocutory appeal

CERTIFICATE OF SERVICE

I, RICHARD YALE FEDER, Counsel for Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on June 26, 1963, I served copies of the foregoing Petition for Writ of Certiorari on the Respondent and on cross-appellant below by mailing a copy thereof in a duly addressed envelope with postage prepaid to each of the following, to wit, GLENN C. MINCER, Assistant State Attorney, State Attorney's Office, Dade County Courthouse, Miami, Florida, and to Honorable RICHARD W. ERVIN, Attorney-General of Florida, Tallahassee, Florida (air mail postage prepaid), attorneys for Respondent, and to JOSEPH P. DURANT, Seybold Building, Miami 32, Florida; and to DANIEL L. GINSBERG, 566 N. E. 15th Street, Miami, Florida, attorney for cross-appellant below.

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APPENDIX

[TITLE OMITTED]

District Court of Appeal, Third District

Opinion filed December 18, 1961.

Interlocutory Appeals from the Circuit Court for Dade County, Lucian C. Proby, Jr., Judge.

Glenn C. Mincer and Joseph N. Durant, Jr., for Richard E. Gerstein.

Dixon, Simon & Rosenthal, Daniel Ginsberg and N. J. Durant, for "PLEASURE WAS MY BUSINESS", et al

Before PEARSON, C. J., and HORTON and BARKDULL, JJ.

PER CURIAM.

In case #61-660, appellant Gerstein seeks review of an order denying his motion for a summary decree in an action seeking to have the book "Pleasure Was My Business" declared obscene within the meaning of § 847.01, Fla.Stat., F.S.A. It should be noted that we are not here called upon to decide the effect on this or similar cases of Chapter 61-7, Laws of Florida, Regular Session, 1961, which was passed while this action was pending and which repealed § 847.01, Fla.Stat., 1959.

The trial court stated in its order that it was prevented from entering a summary decree by the presence of a genuine issue of material fact, the obscene character of the book, which it felt should be judged by the court sitting as a trier of fact upon the presentation of testimony of expert witnesses to establish and prove the contemporary community standards in Dade County by which obscenity should be measured.

torney, as well as to bring the "Ghost Writer" and the Publisher into the action. As the cause proceeded a temporary injunction was entered enjoining a book store and its operators as Defendants. Perhaps the opening conduct of the State Attorney was such as to raise some suspicion of collusion, but later events dispelled this. Consequently, the contention of collusion and impropriety between the State Attorney and his assistant, ARAM GOSHGARIAN, has not been proved and is rejected.

Most important is the contest here existing between the parties as to whether or not the defendant-book is an obscene literary work. Striving to ascertain the answer to this question, the Court examined the testimony of the witnesses, examined the United States Supreme Court cases setting forth the requisites, read the defendant-book twice, and advised itself of the pertinent Florida Statutes. At the outset, the Court is aware that Florida Statute 847.011 is the applicable Florida law relating to obscene literature. This Statute is penal in nature and hardly enlightened the Court as to the legal requirements in determining what is or what is not obscene. Consequently, a higher source had to be found.

The law outlined in the now historic Roth vs. U. S., 77 Sup. Ct., 1304, clearly establishes the ingredients required and to be applied so as to answer the question here posed. The rule therein laid down is: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest?" If the answer be "yes", it is obscene; if "no", it is not obscene. The expression in that statement which most requires definition is "prurient interest". Defined, this expression

means: impure in thought or desire; to incite lascivious thought or desire. Thus defined, this Court then proceeded to analyze the other elements of this profound statement. It occurred to the Court that "average man" and "contemporary community standards" have an affinity and to some degree are synonymous. To find the contemporary community standards would aid greatly to pinpoint the composite individual known as an average man. By this, the Court means that if a majority of citizens in a certain defined locality like baseball, the average man is a baseball fan and this liking becomes an element of the contemporary community standards. Using the experience, knowledge and varied associations of the Court with the people of the community, together with the testimony of the experts presented, the Court concludes that the contemporary community standards holds that the mores of morality are not consonant with promiscuous flaunting of abnormal, unusual and/or perverted sex practices as is the continuing theme of this book. This finding is certainly mindful of the fact that the County of Dade is composed of a variety of localities, one of which, Miami Beach, represents no more than 7% of the population of this County and cannot be concluded to have established the standards for the whole community. This observation is herein made referable to certain testimony relating to practices on Miami Beach, an area almost exclusively catering to the desires and pleasures of a predominantly transient populace. This reference is not made to single out a particular locality of different community standardards, but to point out that contemporary moral standards are composed of all those of this jurisdiction, and not just one isolated area. Interestingly enough, two of the most important defense witnesses reside on Miami Beach.

Witness the writing itself—as hereinbefore stated the book was read twice by the Court. Also numerous excerpts from it were read directly into the record and as a statistical recitation made by one witness as to the occurrence of phrases and words that certainly are foreign to most vocabularies and would usually in conversations only be used either with or by women of ill fame and in places they inhabit, to-wit: "dirty road", "around the world", "three way broad", "wet deck", and "blow storm". The book is resplendent from cover to cover with descriptions of indecent scenes and conversations supposedly having happened at the Moorish Castle or Madam Sherry's other flesh selling godowns. The exhibits of the Defendants, some being great works of literary art, have passages exuding intimate sexual description. A number of these contain violent and highly sensual descriptions of act and dialogue that would burn the ears and eyes of many citizens. Such books as "God's Little Acre" by Caldwell, "East of Eden" by Steinbeck, "Sanctuary" by Faulkner, and others, contain passages that deal with intimate affairs between man and woman at its rawest, or language known best to certain sailors. But none of these works in evidence, in the opinion of this Court, from cover to cover constantly dominate the whole book with such a vile and obscene sexual theme as to bring them within shouting range of the subject of this litigation. The Court cannot escape the conclusion that racy, immoral, unlawful, vile, unnatural, abnormal and disgusting sex practices is the dominant theme of "PLEASURE WAS MY BUSINESS"—arguments for expose of political graft, corruption and a theme of condemnation of prostitution with its attendant evils to the females who participate, not withstanding. In passing, it has occurred to the Court that the more modern trend of literature

dealing with eroticism, that fails to pass the test of obscenity, deals with relations of man and woman completely devoid of feeling, love or tenderness. These works lacking true feeling of the participants for each other, which still are outside the Supreme Court test, have only isolated passages touching on obscenity and have dominant themes other than simply dirty sexual depicturing.

The question of protection afforded by the First Amendment to the United States Constitution and the 13th Declaration of Rights of the Florida Constitution is, of course, a basic right diligently protected by the courts of this State. Exceptions, however, to this jealously guarded constitutional guarantee do exist. One such exception is obscenity as defined in the law. Consequently based upon the cited Roth case, no person has any right under the guise of freedom of speech or press to sell or distribute obscene material, for obscenity has never enjoyed the protection of either the State or Federal Constitutions.

Having determined the dominant theme to be base as depicted (even though alleged to be historically true); having found the contemporary community standards to be high enough that the average man does possess morals against practices recited in the defendant-book, now the Court turns to consider if such dominant theme appeals to the prurient interest of this average man. None of the witnesses were average. All were decidedly above average who expressed expert opinions. To most of them, as well as the Court, the defendant-book was revolting and appealed to the opposite of their prurient interest. As stated above, this wispy fellow is a figure created by the law, just as the reasonable man of tort

ute, transmit, show or transmute the defendant-book, "PLEASURE WAS MY BUSINESS", or any facsimile or copy thereof within the jurisdiction of this Court.

2. That the Defendants, separately and severally, be and they are hereby permanently prohibited and enjoined from printing, publishing or uttering any advertisement within the jurisdiction of this Court, giving information, directly or indirectly, stating or purporting to state, where, now, of whom, or by what means the defendant-book, "PLEASURE WAS MY BUSINESS" or any facsimile or copy thereof, can be purchased, obtained or had.

3. That the Defendants, separately and severally, be and they are hereby permanently prohibited and enjoined from bringing, importing, or transporting into Dade County, Florida, or exporting from Dade County, Florida, by mail, express company, common or private carrier or by any means whatsoever, the defendant-book, "PLEASURE WAS MY BUSINESS", or any facsimile or copy thereof.

4. That the Defendants, separately and severally, be and they are hereby permanently prohibited and enjoined from counseling, hiring, aiding, or abetting any person, agent, clerk, employee, firm, association, partnership or corporation to do or commit any of the acts or things prohibited, enjoined, and enumerated in this final decree.

5. That this Court retains jurisdiction of this cause, the parties and subject matter hereof for such other and further proceeding as may be required by law or equity.

DONE AND ORDERED in the Court House at Miami, Dade County, Florida, this 30 day of March, 1962.

LUCIEN C. PROBY, JR.
Circuit Judge

(Title Omitted)

ORDER DENYING DEFENDANT S. ROBERT TRALINS' PETITION FOR REHEARING

This cause coming on to be heard this date upon defendant S. Robert Tralins' petition for rehearing, and after argument of counsel, examination of the pleadings, and due consideration, it affirmatively appears that the petition for rehearing does not set forth any omissions, oversights, causes or grounds which have not heretofore been considered by this Court and stated in the Final Decree. It is, therefore,

ORDERED AND ADJUDGED that the said petition for rehearing be and is hereby denied.

DONE AND ORDERED in Chambers, Dade County Courthouse, this _____ day of April, A. D., 1962.

LUCIEN C. PROBY, JR.
Circuit Judge

mined the record and found that, re-
fect on this suit of the repeal of § 847.01
e enactment of § 847.011, the allega-
plaint and the evidence offered in sup
more than sufficient to bring this suit
iction of the court under the provisions
ry judgment act, Chapter 87, Fla.Stat.,

urther contends the trial court erred in
ect book to be obscene. We disagree.

nity has never enjoyed the protection of
ral or State Constitutions, no person has
the guise of freedom of speech or press,
or distribute obscene material. See Roth
e, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d
rous cases cited therein; see also Rachleff
App.1960), 124 So.2d 878. The test of ob-
her to the average person, applying con-
mmunity standards, the dominant theme of
aken as a whole, appeals to the prurient
is to say, arouses lascivious or lustful
h v. United States, supra; Rachleff v.
see also § 847.011, supra. It is for the trier
o determine the contemporary community
which obscenity should be measured and,
standards and the test set forth above,
whether or not a given publication is in
Gerstein v. Pleasure Was My Business,
136 So.2d 8; Rachleff v. Mahon, supra; State
1957, 93 So.2d 876. An appellate court will
its judgment on these questions for that
f fact absent a compelling reason to do so
he record. See Rachleff v. Mahon, supra.

Reverting to the case at bar, the trier of fact, in this instance the trial court, examining the evidence as a whole, applied the proper test and concluded that the subject book was obscene. There is nothing in this record that would cause us to disagree with its conclusion.

Accordingly, the final decree appealed is affirmed.

Affirmed.

[TITLE OMITTED]

Counsel for appellant having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy

ATTEST:

WILLIAM P. CARTER

Clerk District Court of
Appeal, Third District

847.011 Prohibition of certain acts in connection with obscene, lewd, etc., materials; penalty

(1) (a) A person who knowingly sells, lends, gives away, distributes, transmits, shows or transmutes, or offers to sell, lend,
or transmute, or ha
with intent to sell,
show, transmute, or
lewd, lascivious, f
masochistic book,
paper, comic book,
or article, writing
graph, motion pic
record, or wire or
printed, or recorde
may or may not re
transmuted into a
tions of such char
indecent or immor
or immoral use o
copies, draws, pho
lishes, or in any
prepares any such
any such charact
publishes, or utte
lished, or uttered
kind, giving info
or purporting to
means any, or w
matter, article,
purchased, obtain
ingly hires, empl
or assist in doin
act or thing mer
and shall be puni
not exceeding on
or both. A perso
violation of this

provisions, is guilty of a felony and shall be punished by imprisonment in the state prison not exceeding five years or in the county jail not exceeding one year or by fine not exceeding $10,000.00, or by both such fine and imprisonment.

(b) The knowing possession by any person of six or more identical or similar materials, matters, articles, or things coming within the provisions of the foregoing paragraph (a) is presumptive evidence of the violation of said paragraph.

(2) A person who knowingly has in his possession, custody or control any obscene lewd lascivious filthy indecent immoral sadistic or masochistic book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument of indecent or immoral use, or purporting to be for indecent or immoral use or purpose, without intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise the same, is guilty of a misdemeanor and shall be punished by imprisonment in the county jail not exceeding six months or by fine not exceeding $500.00, or both. In any prosecution for such possession, it shall not be necessary to allege or prove the absence of such intent.

(3) No person shall as a condition to a sale, alloca-

tion, consignment, or delivery for resale of any paper, magazine, book, periodical, or publication require that the purchaser or consignee receive for resale any other article, paper, magazine, book, periodical, or publication reasonably believed by the purchaser or consignee to be obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic, and no person shall deny or threaten to deny or revoke any franchise or impose or threaten to impose any penalty, financial or otherwise, by reason of the failure of any person to accept any such article, paper, magazine, book, periodical, or publication, or by reason of the return thereof. Whoever violates this section is guilty of a felony and shall be punished by imprisonment in the state prison not exceeding five years or in the county jail not exceeding one year or by fine not exceeding $10,00.00, or by both such fine and imprisonment.

(4) Every act, thing, or transaction forbidden by this section shall constitute a separate offense and shall be punishable as such.

(5) Proof that a defendant knowingly committed any act or engaged in any conduct referred to in this section may be made by showing that at the time such act was committed or conduct engaged in he had actual knowledge of the contents or character of the material, matter, article, or thing possessed or otherwise dealt with, or by showing facts and circumstances from which it may fairly be inferred that he had such knowledge, or by showing that he had knowledge of such facts and circumstances as would put a man of ordinary intelligence and caution on inquiry as to such contents or character.

judge shall be satisfied that sufficient notice of the application therefore has been given to the party restrained of the time when and place where the application for such restraining order is to be made, provided, however, that such notice shall be dispensed with when it is manifest to such judge, from the sworn allegations of the complaint or the affidavit of the plaintiff or other competent person, that the apprehended violation will be committed if an immediate remedy is not afforded.

(c) The person sought to be enjoined shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial.

(d) In the event that a final decree of injunction is entered, it shall contain a provision directing the defendant having the possession, custody, or control of the materials, matters, articles, or things affected by the injunction to surrender the same to the sheriff and requiring the sheriff to seize and destroy the same. The sheriff shall file a certificate of his compliance.

(e) In any action brought as provided in this section, no bond or undertaking shall be required of the state or the state attorney or county solicitor or county prosecuting attorney before the issuance of a restraining order provided for by paragraph (b) of this subsection, and there shall be no liability on the part of the state or the state attorney or the county solicitor or the county prosecuting attorney for costs or for damages sustained by reason of such restraining order in any case where a final decree is rendered in favor of the person sought to be enjoined.

(f) Every person who has possession, custody, or control of, or otherwise deals with any of the materials, matters, articles, or things described in this section, after the service upon him of a summons and complaint in an action for injunction brought under this section, is chargeable with knowledge of the contents and character thereof.

(8) The several sheriffs, constables, state attorneys, county solicitors, and county prosecuting attorneys shall vigorously enforce this section within their respective jurisdictions.

(9) This section shall not apply to the exhibition of motion picture films permitted by § 521.02.

(10) For the purposes of this section, the test of whether or not material is obscene is: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

(11) For the purposes of this section, the word person includes individuals, firms, associations, corporations, and all other groups and combinations. Laws 1961, c. 61-7, §§ 1-11.

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S. ROBERT TRALINS, for himself and
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as a book,

Petitioner,

vs.

RICHARD E. GERSTEIN, as State Attorney,

Respondent

Respondent's Brief in Opposition to Petition for Writ of Certiorari to the District Court of Appeal Third District, State of Florida

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Respondent

Respondent's Brief in Opposition to Petition for Writ of Certiorari to the District Court of Appeal Third District, State of Florida

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The Respondent, Richard E. Gerstein, as State Attorney of the Eleventh Judicial Circuit in and for Dade County, Florida, pursuant to Rule 24, Revised Rules of The Supreme Court of the United States, files this his brief opposing the petition for a writ of certiorari, filed July 1, 1963 in the above-styled cause. The Respondent was the Plaintiff and the Petitioners and others were the Defendants in the trial court.

The letters (A.) refer to the appendix; (p.) to the page in the published book, "Pleasure Was My Business". A copy of the transcript of record was not served upon the Respondent and therefore is not available for reference in this brief. All emphasis supplied.

For explanation and the convenience of this Court, the Respondent has appended hereto the final decree of the Florida trial court, (A. 1); the opinion of the District Court of Appeal, Third District, State of Florida, (A. 9); portions of Florida Statutes 847.011, prohibiting obscene material, (A. 13); portions of Florida Statutes 87.01 - 87.13, relating to declaratory decrees and judgments, (A. 16); and the Fourteenth Amendment to the Constitution of the United States (A. 13).

OPINION OF THE FLORIDA COURT

This petition seeks to review the opinion of the District Court of Appeal, Third District, State of Florida, dated the 19th day of March, 1963, reported at 151 So. 2d 19, attached hereto, (A. 9), affirming the final decree of the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County, wherein the trial court adjudged the petitioner-book, "Pleasure Was My Business", to be an obscene publication, condemned by § 847.011, Florida Statutes. (A. 13)

JURISDICTION

The Petitioner invokes the jurisdiction of the United States Supreme Court under Title 28, United States Code, Section 1257(3). The Respondent says that Title 28, United States Code, Section 1257, when read in pari materia with

from the trial courts which appeals may be taken direct to The Supreme Court (Article V, Section 5(3), Constitution of Florida).

Therefore, the Petitioner should not be permitted to invoke the jurisdiction of The Supreme Court of the United States unless and until he has exhausted the established judicial procedure provided for and sanctioned by the Constitution of the State of Florida, the Florida Appellate Rules, the decisions of The Supreme Court of Florida, and by Title 28, United States Code, Section 1257. (For constitutional direct appeals to The Supreme Court of Florida see State v. Barone, 124 So.2d 490, (Fla. 1960); Boyd v. County of Dade, 123 So.2d 323, (Fla. 1960); Robinson v. State of Florida, 132 So.2d 3, (Fla. 1961).

THE CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States, Section 1, provides that no person shall be deprived of his freedom, liberty or property without due process of law; nor the equal protection of the laws. (A. 13)

THE FLORIDA STATUTES INVOLVED

Section 847.011, Florida Statutes 1961, condemns the publication, distribution and sale of obscene material, provides a remedy and makes it the duty of the State Attorneys to enforce this statute. (A. 13)

Chapter 87, Florida Statutes 1961, relating to Declaratory Decrees, Judgments and Orders, provides for an orderly declaratory procedure whereby all persons may be

made parties who have or claim any interest which would be affected by the declaration. (A. 16)

QUESTION PRESENTED FOR REVIEW

Whether or not the Petitioner-book, "Pleasure Was My Business", is an obscene book condemned by Section 847.011 Florida Statutes 1961, and therefore not protected by the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

The Petitioners, S. Robert Tralins and "Pleasure Was My Business", as a book, and others were defendants in the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County, in Chancery No. 61C-2286. The Respondent, Richard E. Gerstein, as State Attorney of said Circuit, was the Plaintiff below. In this Brief, the parties will be referred to as they stand in the Supreme Court of the United States.

The decision to challenge the sale, distribution and circulation of the book, "Pleasure Was My Business", was made by State Attorney Richard E. Gerstein early in March of 1961, at which time unsolicited complimentary promotional copies were being distributed to newspapers in Dade County, Florida, preparatory to public sales for profit.

The pleading and trial procedure used to judicially accuse, try and test the questionable book was decided and prepared by Assistant State Attorney Glenn C. Mincer, Chief of the Appellate Division.

The Respondent instituted an *action in rem* in the form of a double-barrelled complaint in the Circuit Court for Dade County, Florida, under both the provisions of Chapter 87, Florida Statutes, (A. 16), relating to declaratory decrees and judgments, and also under the provisions of Section 847.011, Florida Statutes 1961, (A. 13), relating to obscene literature, against "Pleasure Was My Business", as a book.

Other alleged interested defendants were Aram P. Goshgarian, a citizen, The Bookworm, Inc., a corporation book vendor and its officers, and S. Robert Tralins, co-author. The publisher, one Lyle Stuart, later intervened. The other co-author, Ruth Barnes, self-styled "Madam Sherry", is a fugitive from Florida justice, with address unknown. Neither the publisher nor the vendors seek certiorari.

The primary purpose of this action in rem was not only to seek a declaratory decree, judicially ascertaining whether or not the petitioner-book, "Pleasure Was My Business", was and is, as a matter of law, obscene literature, but also, (1) to avoid an unnecessary criminal prosecution; (2) to protect the freedom of speech and of the press; and (3) so as not to deprive any person of his freedom, liberty or property without due process and equal protection of the laws.

To this COMPLAINT FOR DECLARATORY JUDGMENT neither the author nor the publisher availed themselves of their first opportunity to test the constitutionality of § 847.011, Florida Statutes, by filing a constitutional motion to dismiss, but in lieu thereof they filed garrulous answers, stating that the book, "Pleasure Was My Busi-

ness", was not obscene material prohibited by the laws of Florida, and was protected by the First and Fourteenth Amendments to the Constitution of the United States.

Pursuant to interlocutory appeals affirming the trial court's order denying summary judgment and denying the Petitioner a jury trial, (Gerstein v. "Pleasure Was My Business", 136 So.2d 8 (Fla. App. 1961), the trial court took oral testimony from expert witnesses to assist the Court in determining the contemporary community standards by which obscenity should be measured and applied them to the questioned publication.

The substance of the trial court's final decree, (A. 1), approved by the Appellate Court, (A. 9), and contested by the Petitioner, is:

> "Applying the test laid down by our appellate courts and by the Florida Statutes, whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest, it is the opinion and finding of this Court that the defendant-book is offensive to the common conscience of this community measured by present day moral standards of this community and is an obscene book condemned by the Florida Statutes."

CONTROLLING QUESTION PRESENTED

DOES THE CONDEMNATION OF "PLEASURE WAS MY BUSINESS" AS AN OBSCENE BOOK BY THE FLORIDA COURTS UNDER THE PROVISIONS OF § 847.011 FLORIDA STATUTES 1961 DEPRIVE ANY PERSON OF HIS FREEDOM OF EXPRESSION IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

ARGUMENT

In the beginning, we are aware of the grave responsibilities involved in an earnest effort to establish a workable procedure by which a final determination can be made in the pending case. The burden is heavy because enjoining the sale and distribution of a book, even one as vile, obscene and offensive to contemporary community standards as "Pleasure Was My Business", is a serious matter.

Nevertheless, the questionable book, "Pleasure Was My Business", by its contents, nature and structure follows a pattern which distinguishes pornographic writing from other forms of written material. Pornography has a form all its own which creeps, unsuspected, upon the uninitiated reader. It is this style and pattern which attracts the prurient reader, repels the average person, offends the community, violates the statutes and is condemned by the Courts.

The Petitioner-book, "Pleasure Was My Business",

is incontestably obscene literature. If a horse is black, and the horse itself is in evidence, no testimony, law or expert, would be admissible to show the horse is white. Such testimony would be immaterial, of no probative value, upon the issue of the color. The admission of such testimony would be a waste of the Court's time, confusing, and would tend to make a mockery of the process of justice.

WHAT ARE THE CONTENTS OF "PLEASURE WAS MY BUSINESS" OFFENSIVE TO THE COMMON CONSCIENCE AND CONDEMNED BY THE LAWS AND COURTS OF THE STATE OF FLORIDA?

THE PORNOGRAPHIC PATTERN

1) The pattern: The pornographic book pattern can easily be distinguished from other types of writing. The geographical location may vary, the names may change, the occupations of the principal characters may be modified, but the basic format of obscene books remains constant. A book designed by the writer to act upon readers as a sexual stimulant must keep constantly before a reader's mind a succession of sexual scenes. The principal technique is to focus a reader's attention on word-pictures of sexual orgies and aberrations, each more lurid than the previous one, and not distract him or her with countervailing side issues. Therefore, the obscene book pattern is substantially void of any appeal to the reader's moral conscience and it seldom if ever alludes to pregnancy, venereal disease, abortions or possible mental or physical harm to prostitutes or their customers. Psychologial aphrodisiacs are exaggerated and

glorified. Remorse or guilt may be alluded to, but only superficially. And such mentions are soon forgotten by a reader because of the series of abnormal, unnatural and perverted sex scenes. (See Pornography and the Law — Respondent's trial Exhibit No. 4).

"Pleasure Was My Business" starts with a few platitudes, then moves directly into a scene which is designed mildly to stimulate the reader sexually. As one reads on, the book becomes more and more obscene until it reaches a climax in a description of unnatural mass sexual orgies such as the passage near the end (Page 185) in which the writer has Madam Sherry, self-styled "Queen of all the Madams throughout Whoredom", (Page 7) saying: "For me, it was the last straw and I made up my mind to get out of the shoddy massage parlor operation."

2) **Profaning the Church; Defiling the Courts:**

Those tolerant of pornography admit that they have no moral conscience: "Nothing offends me!' They see nothing wrong with ascribing immorality to, and poking contempt, ridicule and obscenity at churches, courts, politicians and the "high and mighty" and also at commonly accepted standards of behavior. There seems to be a special attraction in mixtures of the sacred and profane to this minority group, some of whom admit they do not represent the average man or woman. Madam Sherry's writer and publisher, using the tricks of his trade, "pulls out all the stops" and plays this tune for all it is worth. In fact, this particular "madam" specializes in defiling the church, courts and public officials.

Illustrations: (For brevity we omit others.)

a) (P. 52) "No man is a hero to his whore! There was one thing I liked about the atmosphere of a whore house. There was no room for hypocrisy or pretense. Not even in a **church** can one find such sanctity of spirit these days . . ."

b) (P. 158-159) "Yes, I'm talking about those so-called religious leaders — the pillars of society; the priests and the ministers and the parsons. They visited my establishment for the pleasure of the flesh and of so-called corruption within — they too have partaken of the devil's mass and have enjoyed themselves with the followers of de Sade!"

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c) (P. 160) ". . . 'Holy Jesus, did you see that?' cried Wilma, — 'he was a (omitted) priest!" Still half naked, she stooped and picked up a cross and beads which had fallen from his pocket . . ."

d) (P. 169) "So the second justice (Florida Supreme Court Justice in Tallahassee) said: 'I wish I could spend the rest of my days in her whorehouse'."

e) (P. 78) ". . . The irony of this was that I (Madam Sherry) had a choice of standing trial before the very judge who was downtown at that precise moment in the middle of a **daisy**

chain (meaning a mass orgy) with Lois, Kitty, French and Nita!" (Emphasis and explanation supplied.)

3) **Tabco Words:** Any experienced and responsible journalist will testify that certain words, phrases and expressions are journalistically taboo, meaning they are forbidden by tradition, social usage and contemporary standards if not by the moral conscience of the writer. The use of dirty, filthy, obscene words is journalistically inexcusable. The use and repetition of such taboo words fits the pattern of the pornographic writer because, psychologically, lewd and obscene words are associated with lewdness and obscenity.

Writers of pornography almost always claim that their "style" is merely an assertion of their independence and individualism. They also claim that under the Constitutional guarantees of free speech and free press, they are not bound to exercise self-restraint or inhibition in the use of obscenity. These claims and this usage of obscenity are the hallmarks of pornographic material.

Illustrations: (Again for brevity, we omit others.)

a) In the **first five** of the **thirty-seven chapters** of "Pleasure Was My Business", including the two-page preface entitled "Warning", the following taboo words are used the number of times indicated: Madam, 10; whore, 9; whorehouse, 6; whoredom, 3; sluts, 2; and whoring, whoremistress, pimp and bitch, one time each.

b) On Page 28, the taboo words "whore", "whoredom", and "whoremistress", appear four times and continue to run freely throughout the book. The writer stuck to his pornographic format and "style" right through the final chapter in which (Page 220) he has Madam Sherry repenting mildly with the plaintive observation "Although I earned a certain 'aristocratic' status as the queen of all **whoredom**, I'm sure no one will be deluded that it was a good life."

c) The term "John the Bastard", identified as "pimp" for a prostitute named Chickie, appears four times on Page 138, two times on Page 139 and several more times on succeeding pages.

d) The taboo word "pimp" is used three times and "pimphood" twice on Page 96. "Pimp" is repeated twice on Page 97, seven times on Page 98, five times on Page 99 and many times thereafter in the remainder of the book.

e) In one passage, starting on Page 100, the writer tells about "Honey Boy", a Negro described as "a powerful character in more ways than one", who was the pimp of Sally, presumably a white girl . . . "She was born on a truck farm five miles outside of Macon, Georgia." (P. 99).

f) On Page 187, the writer uses two journalistically taboo terms, ". . . just plain two-buck sluts", and ". . . half-assed whores".

g) Probably the most revolting use of taboo words and terms in the whole book is found on Page 117. In a passage about June Boswell, an inmate of Madam Sherry's bawdy house, the writer has other inmates complaining to Madam Sherry because . . . "She's giving trips around the world", and "She lets her customers take the dirt road." And although, on Page 117, the writer has Madam Sherry condemning these acts of sexual perversion, on Page 118 he has Madam Sherry speak admiringly of June Boswell's technique: "To watch June operate was something to see. She had what it takes — I must admit — and she knew how to use it, too." . . . "She was the type who could 'get a rise from a dead man'."

4) **Seduction:** It is hard to imagine pornography without seduction. Characteristic of the pornographic book is the ease with which the dumb voluptuous victim submits to her ratty lover. The reader is led to believe this is a prelude to and justification for almost all prostitution.

Illustrations:

a) (P. 83-85) Sadie, a fifteen year old Polish girl seduced by a professional Pittsburgh pimp, "Cockeyed Jake", is described — "She was a beautiful female machine which seemed to have been created for only one purpose." "She's terrific in bed and she hasn't enough brains to cheat . . ."

b) (P. 174-175) "Alexis was a girl from Paterson, New Jersey." The characteristic tale of seduction is given a new twist upon the same basic pattern when "This bub conned me along for all he was worth, telling me that he loved me and that he wanted to marry me and giving me that little vine-covered cottage with the picket fence routine, and I fell for it— . . . he was an ambassador or something in the State Department. Well, we went to live in the Bahamas . . . he kept saying that he couldn't get married just yet because it was liable to jeopardize his career. Like a dummy, I believed him and we lived together for nearly ten months before I found out that the **S.O.B.** had no intention in the world of marrying me . . . "

5) **Nymphomania:** This word is derived from Greek and Roman mythology. It implies a female, sexually insatiable, who possesses not only an uncontrolled desire but unlimited capacity to engage in continuous promiscuous intercourse. The average happily married man and woman know that this artificial female character is a myth. But pornographic masters of deceit invariably use this myth to create the image of a female character just as the prurient reader would like a woman to be.

Illustrations:

(Pp. 91-94) "Beatrice Greenway, a socialite who lived in Coral Gables, got bored . . . and decided to have a fling at the Moorish Castle."

"She came in, drew me to one side and said: 'Madam Sherry, I am going crazy. I have to have a man right away!' . . ."

"I, (Madam Sherry) sent one of the maids for Felix (described as a girl tester) . . . Then I told him what to do and how to do it. 'I don't want any complaints from her, Felix'."

"That was at **four o'clock.** At **five o'clock** a loud scream pierced the downstairs and I dashed down the hall and burst into the room. Felix was doing his best to satisfy the passion-frenzied socialite. He turned around and said: 'Madam Sherry, I have to hold this pillow over her head — she screams to beat the band'."

"By **ten that night,** Beatrice Greenway had finished screaming into the pillow. A pale and wan Felix came into the dining room where I was . . . 'Madame Sherry', he said finally, 'She wants another man'."

"I went into the room and found the illustrious socialite spread-eagle on the bed, her head hanging backward over the edge, her hair almost brushing the carpet . . . glazed eyes . . . the expression on her face was terrifying."

"'Get me another man,' she moaned . . . 'Felix was all right, but he just wasn't man enough for me'."

"'I'll get you another man,' . . . so I called him (Don) and asked him to come right over."

". . . The **next morning about nine** Beatrice came out . . . ." (satisfied)

MEMO: If this yarn about "Beatrice Greenway" is believed, then the reader must also believe that this modern day nymphomanic enjoyed, from four o'clock one afternoon until nine o'clock the next morning (a period of about seventeen [17] hours) continuous frantic intercourse with two previously unknown, but unusually endowed, men before she was sexually satiated.

6) **Unnatural and abnormal sexual stimulants:**

As previously stated, the typical pornographic book, in definite progression, page by page and chapter by chapter, becomes more and more obscene. When stories of ordinary sexual intercourse are no longer intoxicating, then additional stronger prurient stimulants must be stirred into the boiling brew. Characteristic of this overloaded sex style is the literary style of interweaving a story within a story such as the "Peepholers" (pp. 48; 94); "Exhibitionists" (p. 158); "Homosexual" (pp. 95; 158; 175; 176); "Miscegenation" (pp. 99; 100; 101); "Masturbation" pp. 118-119; 159; 183-185); "Oversexed Males" (pp. 91-94; 100; 106; 199-203); "Mass Orgies" (pp. 78; 129; 154-155);

"Oral Copulation" (pp. 119; 181; 199-203); "Sadists, Masochistis and Flagellants" (pp. 154-155).

7) **Flagellation, Sadism and Masochism:**

The dictionary defines masochism as "abnormal sexual passion characterized by pleasure in being abused by one's associate." Sadism is defined as "a sexual perversion in which gratification is obtained by torturing the loved person." Flagellation is defined as "a beating or whipping."

The acts described by these words, as used in "Pleasure Was My Business", (pp. 154-155) are prohibited by Florida Statute 847.011.

The words, their connotation, and the writer's exaggerated description of the acts follow the pattern of pornographic writing.

The writer of "Pleasure Was My Business" devotes one whole chapter of the book, Chapter Twenty-Three, beginning at Page 154, to acts of masochism, sadism, flagellation and other sex deviations in which the "girls" engaged with "clients" of the bawdy house.

Illustration: (Chapter 23)

a) (P. 154) "Kay, the hillbilly girl from Georgia, always seemed to know the proper way to handle the sadists, the masochists, the flagellants and others, who from time to time paid through the nose for their pleasures."

"One couple in particular used to visit us regularly each November. They were in the canning business in Delaware and could well afford the high prices we charged for their 'whippings'. This couple preferred to disrobe completely and lie down side by side across a bed in the soundproof room while Kay and Felix completely nude too, except for their shoes and stockings, whipped them on their behinds into a frenzy of excitement. Husband and wife, lying side by side on the bed, would then clasp each other and copulate while they were being whipped. The cries of agonized passion could hardly be muffled behind those closed doors." (See dictionary definition of **masochism** as distinguished from **sadism.)**

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b) (P. 155) "There was another couple . . . The wife would mount one of the male prostitutes and while she was thus impaled, her husband would slap her rump with his palms until she ended her passion in a frenzied orgasm and then collapsed in a dead faint . . ." (a mass orgy criss-cross where the husband is a sadist, the wife is a masochist and a male becomes the prostitute.

No attempt is made here to classify or relate all the vile, obscene and offensive matter contained in this book. It suffices to say that the book as a whole from cover to cover fits the pattern of pornographic writing, is offen-

sive to the common conscience and condemned by the laws and the courts of the State of Florida.

In the cases of **Brown v. Kingley Books,** (N. Y. 1956), 134 NE2d 461 and **U. S. v. Newman,** (2 Circ., 1944), 143 F.2d 389, the courts found the printed matter in question to be indisputably pornographic and obscene per se. The plaintiff submits that the defendant-book is also obscene per se in that it falls within the following definitions of hard-core pornography:

> "it focuses predominantly on what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification. Recognizable 'by the insult it offers, invariably, to sex and to the human spirit'. (D. H. Lawrence, Pornography and Obscenity, 1930, P. 12), it is to be differentiated from the bawdy and the ribald. Depicting dirt for dirt's sake, the obscene is the vile, rather than the coarse, the blow to sense, not merely to sensibility. It smacks at times, of fantasy and unreality, of sexual perversion and sickness and represents, according to one thoughtful scholar, 'a debauchery of the sexual faculty.' Murray, Literature and Censorship, 14 Books on Trial, 393, 394 . . . " **People v. Richmond County News, Inc.,** (1961), 216 NYS 2d 369.

And in **Kahn v. United States,** (1962) 300 F.2d78:

> "Certainly 'hard-core pornography', which **unquestionably would be obscene** and nonmailable, would include pictorial and written descriptions

of sex perversion and of degenerate bestiality. Such material, to the Roth case's "average person" is repulsive, loathsome and abhorrent. Such a person would describe it as nasty, foul, putrid and hideous."

In order to show how the defendant-book fits the pattern of hard-core pornography, it was necessary for us to quote many passages from the book. We must apologize to the Court for some of the vile passages we quoted, but the defendants leave us no alternative.

THE TEST FOR PORNOGRAPHY

The judgment and opinion of the District Court of Appeal, Third District, State of Florida, which the Petitioner seeks to quash, expressly found that the trial court applied the correct legal test in determining the obscenity of the book, "Pleasure Was My Business".

The Florida courts carefully and judiciously followed the pronouncement in **Roth v. U. S.**, (1957), 354 U.S. 476, 487, 77 S.Ct. 1304, 1310, "obscene material is material which deals with sex in a manner appealing to prurient interest." In also defining its language to mean "material having a tendency to excite lustful thoughts", the Court further noticed that it could see no difference between the meaning of obscenity under the approved case law and that adopted by the drafters of the Model Penal Code, wherein "prurient" was equated with a "shameful or morbid interest in nudity, sex, or excretion." The provision cited by the Court says that a thing is obscene when its dominant appeal is to the prurient interest and "if it goes substantially beyond the customary limits of candor in

description or representation of such matters." **A.L.I. Model Penal Code, Sec. 207.10 (2) (Tent. Draft No. 6, 1957).** The Court then pronounced the following as the legal test of obscenity:

> "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

And finally, the Court ruled that the trial courts had sufficiently followed this standard, and, in so ruling, the Court approved the trial court's jury instruction, reading in part as follows:

> "The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those it is likely to reach. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire content, and you are not to consider detached or separate portions in reaching a conclusion. You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourselves **does it offend the common conscience of the community by present-day standards.**" (Emphasis supplied.)

It is the Respondent's contention in the case at bar that if the Florida courts applied the proper test of obscenity as pronounced and defined in the abovementioned

Roth case, then its final decree should not be disturbed. This argument is supported by a decision of the Supreme Court of Wisconsin in the case of **State v. Chobot,** (1961), 106 NW 2d 286, wherein the Court reasoned as follows:

> "In this case the trial court adopted and applied to the exhibits the standard set forth in the Roth case as the test of obscenity. The court was the finder of the fact, appellant having waived trial by jury. Thus, it was the 'exclusive judge of what the common conscience of the community is . . . as a whole.'
>
> * * * * *
>
> "The trial court stated in its decision:
>
> > 'The dominant theme of each item of material noted, taken as a whole, to the average person, applying contemporary community standards, appeals to prurient interest within the meaning of the rule of the Roth case and is obscene. . . . '
>
> "Appellant calls attention to several cases involving obscenity convictions since the Roth case, where certiorari was granted by the United States Supreme Court and the judgments reversed without opinion, citing the Roth case. Sunshine Book Co. v. Summerfield, (1958), 355 U.S. 732, 78 S.Ct. 365, 2 L.Ed. 2d 352; One, Inc. v. Olesen, (1958), 355 U.S. 371, 78 S.Ct. 364, 2 L.Ed 2d 352 . . . It is argued that the effect of these decisions is to change the standard enun-

ciated in the Roth case. Analysis of the cases discloses that the tests of obscenity there applied were not the test set forth and approved in the Roth case. It is apparent that the United States Supreme Court, in citing the Roth case in each such reversal, has insisted that the test to be applied is that approved in the Roth case."

It is submitted that the Florida appellate and trial courts rendered their decisions clearly and specifically within the framework of the legal requirements set forth in the Roth case, supra. The most concrete evidence of this may be seen in the following findings of the trial court in its final decree:

"Using the experience, knowledge and varied associations of the Court with the people of the community, together with the testimony of the experts presented, the Court concludes that the contemporary community standards holds that the mores of morality are not consonant with promiscuous flaunting of abnormal, unusual and or perverted sex practices as is the continuing theme of this book." (A. 3-4)

* * * * *

"Relying upon the Court's experience and finding the Plaintiff's witnesses more able to determine this than the Defendants', the Court finds that the average man would have his prurient interest aroused by the dominant theme of this book. (A. 6)

> "It is the opinion of this Court and this Court finds the defendant-book, "PLEASURE WAS MY BUSINESS", taken as a whole, does exceed the limits of tolerance imposed by the present day community standards of the average man of this community with respect to freedom of expression in matters concerning sex and sex relations. (A. 6-7)
>
> "Applying the test laid down by our Appellate Courts and by the Florida Statutes, whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest, it is the opinion and finding of this Court that the defendant-book is offensive to the common conscience of this community measured by present day moral standards of this community and is an obscene book condemned by the Florida Statutes." (A. 7)

These findings by the Florida courts were strongly supported by the testimony of the plaintiff's witnesses. Before discussing this testimony, however, it is deemed necessary to answer the defendants' contention that the witnesses for the plaintiff were not familiar with the contemporary moral standards of the community due to their lack of knowledge of the sexual mores and literary tastes of this community. The moral standards or moral code of a community was described or analyzed by the Supreme Court of Florida as follows:

> "As we understand the word morals it means the code of conduct adopted and used by a par-

> ticular people at a particular time. Such code expresses in thought and action the consensus of opinion of a people as to what is right and wrong, what is and is not acceptable in the conduct of persons in that community at that time. This code of conduct is formulated and taught to a people by its churches, its schools, to children by parents, and is influenced by the actions and conduct of friends, neighbors and associates. Parts of such code or standard are also frequently expressed by the people, through their elected representatives, in the enactment of statutes and ordinances. Such code of conduct determines and is orals. **It must and does encompass more than sexual conduct.** It relates as well to common decency, cleanliness of mind and body, honest, truthfulness, and proper respect for established ideals and institutions, among other things." (Emphasis supplied). **State v. Clein,** (Fla.), 93 So. 2d 876.

If this is the correct definition of the moral standards of this community, then it is submitted that the plaintiff's witnesses are unusually cognizant of such standards, for they are not only long-time residents of this community, they are also outstanding representatives of the judiciary, the clergy, the legal profession, the press, and the Florida Legislature. Indeed, such men have assumed the great responsibility of formulating, teaching and affording stability to this community's moral standards.

With these qualifications in mind, let us briefly review the testimony offered by the respondent with special

emphasis on the witnesses' opinions in the light of the aforementioned test of obscenity in the **Roth** case.

JOHN T. BILLS, a resident of Dade County for 21 years, with considerable experience in publishing and editing newspapers, testified that the defendant-book would offend the common conscience of this community and that the book was "calculated to appeal to prurient interest." He further stated that in his opinion "this book could exert sexual stimulation upon many thousands of people."

ALBERT R. SCHMIDT, as Reverend of the Grace Lutheran Church, is responsible for the spiritual well-being of 1,000 members of the community in question. He testified that the defendant-book would be offensive to the moral standards of our community, and that anything constructive that may be found in the book is definitely outweighed by its pornographic features.

The Honorable BEN J. SHEPPARD, Judge of the Juvenile Court for Dade County, a doctor as well as a lawyer, testified that the defendant-book would offend the moral standards of our community; that it made him nauseous; that it would appeal to the average adult's and adolescent's prurient interest; that the book definitely arouses a prurient interest; and that it would act as an aphrodisiac on the average man.

CLYDE ATKINS, a prominent lawyer and civic leader in Dade County for 20 years testified that the defendant-book does offend the common conscience of this community; that the Kinsey Report, which was relied upon so heavily by the defense witnesses, does not relate

necessarily to this particular area; and the book in question would "appeal to the prurient interest of the average man".

GEORGE HOLLAHAN, JR., State Representative in Group 1 for Dade County who actively sponsored legislation condemning obscene literature, testified that the defendant-book "does come within the test as set forth by the Legislature"; that its dominant theme does appeal to prurient interest; and that the book is offensive to the common conscience of the community measured by present-day moral standards.

It is apparent from this brief resume of the testimony of the plaintiff's witnesses that the trial court was considerably aided by this testimony in determining whether or not the defendant-book is obscene.

The defendants apparently believe that the court should have been bound by th opinion of the defense witnesses who testified that, in their opinion, the defendant-book was not obscene under the prevailing law. However, the law is clear that the opinion of an expert is not conclusive in the sense that the jury or the court is bound by his opinion. **13 Fla. Jur. 420, Evidence, Sec. 419.** It is submitted that the fact that the trial court found the testimony of the plaintiff's witnesses was of greater weight than that of the defense witnesses could not be construed as error.

The defendants contend that the plaintiff failed to prove by competent evidence what are the contemporary community standards by which the defendant-book should be judged. In answer to this, the plaintiff submits that

the trial court, as trier of the facts, was presumably cognizant of those standards, and therefore, it was not necessary for the plaintiff to prove the said standards. The purpose of offering expert testimony was to aid the court in judging the defendant-book, and was not to prove or disprove any of the various elements of the obscenity test. As this Court stated in Gerstein v. "Pleasure Was My Business", (Fla. 1962), 136 So. 2d8:

> "It was within the province of the court, as trier of the facts, to determine the contemporary community standards by which obscenity should be measured and apply them to the questioned publication. It was equally within its province to seek aid, in the form of expert testimony, in making this determination. See State v. Clein, (Fla. 1957), 93 So.2d 876; Rachleff v. Mahon, (Fla. 1960), 124 So.2d 878."

We do not pretend that these standards are the only tests for obscene books, nor do we contend that all questionable writings can be easily measured by the simple application of a merchant's mechanical ruler. It is our contention that pornographic books have a definite pattern, structure, characteristic and standard by which the questionable book itself can be measured.

We have given due consideration to the responsibilities connected with an earnest effort to establish a workable procedure which will be a useful criteria or guide for not only the pending case, but also for future reference in other similar cases.

We expressly point out that not one of these seven

standards, characteristics, criteria, or measures **standing alone** is convincing proof that a 220 page questionable book is "legally obscene." Each questionable book or writing must stand on its own feet and should be measured in relationship not only to one or more of the seven standards, but also in relationship to the whole writing.

After reading the questionable book, "Pleasure Was My Business", and applying all the known standards, including the standards chosen by the publisher, it is crystal clear that the dominant theme of the material, taken as a whole, appeals to prurient interest, shocking to the moral conscience of any community, and the Courts should judicially declare it to be an obscene book, condemned by the laws of Florida.

CONCLUSION

WHEREFORE, the Petition affirmatively shows that the interested parties have not been deprived of their rights guaranteed by the Constitution of the United States, but on the contrary, they are before The Supreme Court of the United States because they have abused these rights, and for this reason, the Respondent respectfully opposes this Petition for Certiorari.

Respectfully submitted,

By Glenn C. Mincer

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CERTIFICATE OF SERVICE

I, GLENN C. MINCER, Assistant State Attorney, Counsel for Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on July 26, 1963, I served copies of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari to the District Court of Appeal, Third District, State of Florida, on the Petitioner by mailing a copy thereof in a duly addressed envelope with postage prepaid to each of the following, to-wit, RICHARD YALE FEDER, 100 Biscayne Blvd. South, Miami 32, Florida; TOBIAS SIMON, c/o Fla. Civil Liberties Union, 223 S. E. 1st Street, Miami 32, Florida; HOWARD W. DIXON, 409 Seybold Building, Miami 32, Florida; and IRMA ROBBINS FEDER, 17491 N. E. 5th Avenue, North Miami Beach, Florida.

Glenn C. Mincer

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APPENDIX

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY. — IN CHANCERY NO. 61C-2286

RICHARD E. GERSTEIN, as State Attorney of the Eleventh Judicial Circuit in and for Dade County, Florida,

Plaintiff,

vs.

"PLEASURE WAS MY BUSINESS", et al.,

Defendants.

FINAL DECREE

(Filed April 2, 1962)

This cause arises out of the complaint of Richard E. Gerstein, as State Attorney, seeking declaratory decree to judicially ascertain whether or not the defendant-book, "Pleasure Was My Business", is obscene material. There are no disputed issues of fact except the defendants contend the defendant-book is not obscene material. The questionable material was co-authored, or ghost-written, by the defendant, S. Robert Tralins; published by the defendant Lyle Stuart; and sold, offered for sale and disseminated to several retail book stores by the defend-

ant Stuart, within the jurisdiction of this Court, including the defendant, The Bookworm, Inc., whose officers are the defendants, Herbert Cream, Edward Lewen and Harold Lewen.

This cause now comes on upon final hearing before the undersigned, and after considering the testimony of the witnesses, oral argument of counsel, and having read the defendant-book, the Court finds as follows: That this action reveals the book, "PLEASURE WAS MY BUSINESS', was joined herein as a Defendant, along with Defendants, ARAM P. GOSHGARIAN, S. ROBERT TRALINS, and LYLE STUART. This suit, therefore, in this regard takes on the aspects of an action in rem. The Court being aware of this, is of the opinion that the contention of collusion by the State Attorney in making one of his assistants a defendant is not well founded. To enjoin the publication, distribution and sale of this book, it was deemed appropriate to bring an action against the holder of the copy of this book, known to the State Attorney, as well as to bring the "Ghost Writer" and the Publisher into the action. As the cause proceeded a temporary injunction was entered enjoining a book store and its operators as Defendants. Perhaps the opening conduct of the State Attorney was such as to raise some suspicion of collusion, but later events dispelled this. Consequently, the contention of collusion and impropriety between the State Attorney and his assistant, ARAM GOSHGARIAN, has not been proved and is rejected.

Most important is the contest here existing between the parties as to whether or not the defendant-book is an obscene literary work. Striving to ascertain the answer to this question, the Court examined the testimony

of the witnesses, examined the United States Supreme Court cases setting forth the requisites, read the defendant-book twice, and advised itself of the pertinent Florida Statutes. At the outset, the Court is aware that Florida Statute 847.011 is the applicable Florida law relating to obscene literature. This Statute is penal in nature and hardly enlightened the Court as to the legal requirements in determining what is or what is not obscene. Consequently, a higher source had to be found.

The law outlined in the now historic Roth vs. U. S., 77 Sup. Ct., 1304, clearly establishes the ingredients required and to be applied so as to answer the question here posed. The rule therein laid down is: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest?", If the answer be "yes", it is obscene; if "no", it is not obscene. The expression in that statement which most requires definition is "prurient interest". Defined, this expression means: impure in thought or desire; to incite lascivious thought or desire. Thus defined, this Court then proceeded to analyze the other elements of this profound statement. It occurred to the Court that "average man" and "contemporary community standards" have an affinity and to some degree are synonymous. To find the contemporary community standards would aid greatly to pinpoint the composite individual known as an average man. By this, the Court means that if a majority of citizens in a certain defined locality like baseball, the average man is a baseball fan and this liking becomes an element of the contemporary community standards. Using the experience, knowledge and varied associations of the Court with the people of the community, together with

the testimony of the experts presented, the Court concludes that the contemporary community standards holds that the mores of morality are not consonant with promiscuous flaunting of abnormal, unusual and/or perverted sex practices as is the continuing theme of this book. This finding is certainly mindful of the fact that the County of Dade is composed of a variety of localities, one of which, Miami Beach, represents no more than 7% of the population of this County and cannot be concluded to have established the standards for the whole community. This observation is herein made referable to certain testimony relating to practices on Miami Beach, an area almost exclusively catering to the desires and pleasures of a predominantly transient populace. This reference is not made to single out a particular locality of different community standards, but to point out that contemporary moral standards are composed of all those of this jurisdiction, and not just one isolated area. Interestingly enough, two of the most important defense witnesses reside on Miami Beach.

Witness the writing itself — as hereinbefore stated the book was read twice by the Court. Also numerous excerpts from it were read directly into the record and a statistical recitation made by one witness as to the occurrence of phrases and words that certainly are foreign to most vocabularies and would usually in conversations only be used either with or by women of ill fame and in places they inhabit, to-wit: "dirty road", "around the world", "three way broad", "wet deck", and "blow storm". The book is resplendent from cover to cover with descriptions of indecent scenes and conversations supposedly having happened at the Moorish Castle or Madam Sherry's other flesh selling godowns. The

exhibits of the Defendants, some being great works of literary art, have passages exuding intimate sexual description. A number of these contain violent and highly sensual descriptions of act and dialogue that would burn the ears and eyes of many citizens. Such books as "God's Little Acre" by Caldwell, "East of Eden" by Steinbeck, "Sanctuary" by Faulkner, and others, contain passages that deal with intimate affairs between man and woman at its rawest, or language known best to certain sailors. But none of these works in evidence, in the opinion of this Court, from cover to cover constantly dominate the whole book with such a vile and obscene sexual theme as to bring them within shouting range of the subject of this litigation. The Court cannot escape the conclusion that racy, immoral, unlawful, vile, unnatural, abnormal and disgusting sex practices is the dominant theme of "PLEASURE WAS MY BUSINESS" — arguments for expose of political graft, corruption and a theme of condemnation of prostitution with its attendant evils to the females who participate, not withstanding. In passing, it has occurred to the Court that the more modern trend of literature dealing with eroticism, that fails to pass the test of obscenity, deals with relations of man and woman completely devoid of feeling, love or tenderness. These works lacking true feeling of the participants for each other, which still are outside the Supreme Court test; have only isolated passages touching on obscenity and have dominant themes other than simply dirty sexual depictation.

The question of protection afforded by the First Amendment to the United States Constitution and the 13th Declaration of Rights of the Florida Constitution is, of course, a basic right diligently protected by the

courts of this State. Exceptions, however, to this jealously guarded constitutional guarantee do exist. One such exception is obscenity as defined in the law. Consequently based upon the cited Roth case, no person has any right under the guise of freedom of speech or press to sell or distribute obscene material, for obscenity has never enjoyed the protection of either the State or Federal Constitutions.

Having determined the dominant theme to be base as depicted (even though alleged to be historically true); having found the contemporary community standards to be high enough that the average man does possess morals against practices recited in the defendant-book, now the Court turns to consider if such dominant theme appeals to the prurient interest of this average man. None of the witnesses were average. All were decidedly above average who expressed expert opinions. To most of them, as well as the Court, the defendant-book was revolting and appealed to the opposite of their prurient interest. As stated above, this wispy fellow is a figure created by the law, just as the reasonable man of tort practice. He is a composite of all the likes, dislikes, habits, desires, practices, idiosyncracies and qualities that are most commonly found in this jurisdiction. Relying upon the Court's experience and finding the Plaintiff's witnesses more able to determine this than the Defendants', the Court finds that the average man would have his prurient interest aroused by the dominant theme of this book.

It is the opinion of this Court and this Court so finds the defendant-book, "PLEASURE WAS MY BUSINESS", taken as a whole, does exceed the limits of tolerance imposed by the present day community standards

of the average man of this community with respect to freedom of expression in matters concerning sex and sex relations.

Applying the test laid down by our Appellate Courts and by the Florida Statutes, whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest, it is the opinion and finding of this Court that the defendant-book is offensive to the common conscience of this community measured by present day moral standards of this community and is an obscene book condemned by the Florida Statutes.

WHEREFORE, IT IS CONSIDERED, ORDERED AND DECREED:

1. That the Defendants, separately and severally, be and they are hereby permanently prohibited and enjoined from printing, publishing, disseminating, selling, lending, giving away, distributing, transmitting, showing, transmuting, or offering to sell, lend, give away, distribute, transmit, show or transmute the defendant-book, "PLEASURE WAS MY BUSINESS", or any facsimile or copy thereof within the jurisdiction of this Court.

2. That the Defendants, separately and severally, be and they are hereby permanently prohibited and enjoined from printing, publishing or uttering any advertisement within the jurisdiction of this Court, giving information, directly or indirectly, stating or purporting to state, where, how, of whom, or by what means the defendant-book, "PLEASURE WAS MY BUSINESS" or

any facsimile or copy thereof, can be purchased, obtained or had.

3. That the Defendants, separately and severally, be and they are hereby permanently prohibited and enjoined from bringing, importing, or transporting into Dade County, Florida, or exporting from Dade County, Florida, by mail, express company, common or private carrier or by any means whatsoever, the defendant-book, "PLEASURE WAS MY BUSINESS", or any facsimile or copy thereof.

4. That the Defendants, separately and severally, be and they are hereby permanently prohibited and enjoined from counselling, hiring, aiding, or abetting any person, agent, clerk, employee, firm, association, partnership or corporation to do or commit any of the acts or things prohibited, enjoined, and enumerated in this final decree.

5. That this Court retains jurisdiction of this cause, the parties and subject matter hereof for such other and further proceeding as may be required by law or equity.

DONE AND ORDERED in the Court House at Miami, Dade County, Florida, this 30 day of March, 1962.

LUCIEN C. PROBY, JR.,
Circuit Judge

151 So. 2nd 19:

S. Robert TRALINS, for himself, and
"Pleasure Was My Business,"
as a book, Appellant,

v.

Richard E. GERSTEIN, as State Attorney,
Appellee.

No. 62-370.

District Court of Appeal of Florida.
Third District.

March 19, 1963.

Rehearing Denied April 3, 1963.

Richard E. Gerstein, State Atty., Glenn C. Mincer and Joseph Durant, Asst. State Attys., Richard W. Ervin, Atty. Gen., and David U. Tumin, Asst. Atty. Gen., for appellee.

Howard Dixon, Tobias Simon, Miami, Richard Yale Feder, Miami Beach, and Daniel L. Ginsberg, Miami, for appellant.

Before HORTON, BARKDULL and HENDRY, JJ.

HORTON, Judge.

Appellant, defendant below, seeks review of an adverse final decree finding the book, "Pleasure Was My Business," to be obscene and condemned by the Florida Statutes, and enjoining its publication or dissemination. We affirm.

On March 6, 1961, the appellee, as state attorney, filed a complaint for declaratory decree under the provisions of Chapter 87, Fla.Stat., F.S.A., and the then applicable statute relating to obscene literature § 847.01, Fla.Stat., F.S.A., 1959. The complaint sought a determination of whether or not the subject book was, as a matter of law, obscene, and such other relief as the court might deem meet and proper. Subsequently, the Legislature of the State of Florida repealed § 847.01, supra, and simultaneously enacted § 847.011, Fla.Stat., F.S.A., 1961, to become effective May 5, 1961. Section 847.01, supra, contained a provision authorizing state's attorneys to institute declaratory judgment proceedings to determine whether printed matter be obscene. However, § 847.011, supra, contained no such provision. On June 8, 1961, appellee was allowed to amend his complaint to reflect the enactment of § 847.011 supra. As amended, the complaint alleged, inter alia, that this new statute had no effect on the status, rights, powers, duties or liabilities of the parties which would affect the determination of this controversy. Ultimately the cause came on for final hearing, and after reading the subject book and considering the testimony of the witnesses and the oral argument of counsel, the chancellor entered the final decree appealed, saying:

"Applying the test laid down by our Appellate Courts and by the Florida Statutes, whether to

> the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest, is is the opinion and finding of this Court that the defendant-book is offensive to the common conscience of this community measured by present day moral standards of this community and is an obscene book condemned by the Florida Statutes."

The appellant contends that the repeal of § 847.01, supra, and its replacement by § 847.011, supra, while this suit was pending ousted the circuit court of jurisdiction since the latter statute does not make provision for the granting of declaratory relief in such cases. We find this contention to be without merit.

[1] We have examined the record and found that, regardless of the effect on this suit of the repeal of § 847.01 and simultaneous enactment of § 847.011, the allegations of the complaint and the evidence offered in support thereof are more than sufficient to bring this suit within the jurisdiction of the court under the provisions of the declaratory judgment act, Chapter 87, Fla. Stat., F.S.A.

Appellant further contends the trial court erred in finding the subject book to be obscene. We disagree.

[2-4] Since obscenity has never enjoyed the protection of either the Federal or State Constitutions, no person has the right, under the guise of freedom of speech or press, to possess, sell or distribute obscene material. See Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1

L.Ed.2d 1498, and numerous cases cited therein; see also Rachleff v. Mahon, Fla.App.1960, 124 So.2d 878. The test of obscenity is whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to the prurient interest, that is to say, arouses lascivious or lustful thoughts. Roth v. United States, supra; Rachleff v. Mahon, supra; see also § 847.011, supra. It is for the trier of the facts to determine the contemporary community standards by which obscenity should be measured and, applying these standards and the test set forth above, to determine whether or not a given publication is in fact obscene. Gerstein v. "Pleasure Was My Business," Fla.App.1961, 136 So.2d 8; Rachleff v. Mahon, supra; State v. Clein, Fla.1957, 93 So.2d 876. An appellate court will not substitute its judgment on these questions for that of the trier of fact absent a compelling reason to do so apparent in the record. See Rachleff v. Mahon, supra.

[5] Reverting to the case at bar, the trier of fact, in this instance the trial court, examining the evidence as a whole, applied the proper test and concluded that the subject book was obscene. There is nothing in this record that would cause us to disagree with its conclusion.

Accordingly, the final decree appealed is affirmed.

Affirmed.

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PERTINENT PARTS OF § 847.011, F.S. 1961

847.011 Prohibition of certain acts in connection with obscene, lewd, etc., materials; penalty.—

(1) (a) A person who knowingly sells, lends, gives away, distributes, transmits, shows or transmutes, or offers to sell, lend, give away, distribute, transmit, show or transmute, or has in his possession, custody, or control with intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise in any manner, any obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article,

writing, paper, card, picture, drawing, photograph, motion picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument of indecent or immoral use, or purporting to be for indecent or immoral use or purpose; or who knowingly designs, copies, draws, photographs, poses for, writes, prints publishes, or in any manner whatsoever manufactures or prepares any such material, matter, article, or thing of any such character; or who knowingly writes, prints, publishes, or utters, or causes to be written, printed, published, or uttered, any advertisement or notice of any kind, giving information, directly or indirectly, stating, or purporting to state, where, how, of whom, or by what means any, or what purports to be any, such material, matter, article, or thing of any such character can be purchased, obtained, or had; or who in any manner knowingly hires, employs, uses, or permits any person to do or assist in doing, either knowingly or innocently, any act or thing mentioned above, is guilty of a misdemeanor and shall be punished by imprisonment in the county jail not exceeding one year or by fine not exceeding $1,000.00, or both. A person who, after having been convicted of a violation of this section, thereafter violates any of its provisions, is guilty of a felony and shall be punished by imprison-

ment in the state prison not exceeding five years or in the county jail not exceeding one year or by fine not exceeding $10,000.00, or by both such fine and imprisonment.

* * * * * *

(7) (a) The circuit court has jurisdiction to enjoin a threatened violation of this section upon complaint filed by the state attorney, county solicitor, or county prosecuting attorney in the name of the state upon the relation of such state attorney, county solicitor, or county prosecuting attorney.

* * * * * *

(f) Every person who has possession, custody, or control of, or otherwise deals with any of the materials, matters, articles, or things described in this section, after the service upon him of a summons and complaint in an action for injunction brought under this section, is chargeable with knowledge of the contents and character thereof.

* * * * * *

(10) For the purposes of this section, the test of whether or not material is obscene is: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

PERTINENT PARTS OF CHAPTER 87, FLORIDA STATUTES 1961

DECLARATORY DECREES, JUDGMENTS AND ORDERS

87.01 Scope, jurisdiction of circuit court.— The circuit courts of the state are hereby invested with authority and original jurisdiction and shall have the power upon a filed complaint, to declare rights, status and other equitable or legal relations whether or not further relief is or could be claimed or prayed. No action or procedure shall be open to objection on the ground that a declaratory decree, judgment or order is prayed for. The circuit court's declaration may be either affirmative or negative in form and effect and such circuit court declaration shall have the force and effect of a final decree, judgment or order. The circuit courts may enter declaratory decrees, judgments or orders as to the existence, or nonexistence:

(1) Of any immunity, power, privilege or right; or

(2) Of any fact upon which the existence or nonexistence of such immunity, power, privilege or right does or may depend, whether such immunity, power, privilege or right now exists or will arise in the future. Any person seeking a declaratory decree, judgment or order may, in addition to praying for a circuit court declaration, also pray for additional, alternative, co-

ercive, subsequent or supplemental relief in the same action.

History.—§1, ch. 21820, 1943; §2, ch. 29737, 1955.

87.02 Power to construe, etc.—Any person claiming to be interested or who may be in doubt as to his rights under a deed, will, contract or other article, memorandum or instrument in writing or whose rights, status or other equitable or legal relations are affected by a statute, or any regulation made under statutory authority, or by municipal ordinance, contract, deed, will, franchise, or other article, memorandum or instrument in writing may have determined any question of construction or validity arising under such statute, regulation, municipal ordinance, contract, deed, will, franchise, or other article, memorandum or instrument in writing, or any part thereof, and obtain a declaration of rights, status or other equitable or legal relations thereunder.

History.—§2, ch. 21820, 1943.

* * * * * *

87.05 Enumeration not exclusive.—The enumeration in §§87.02, 87.03 and 87.04 does not limit or restrict the exercise of the general powers conferred in §87.01, in any proceeding where declaratory relief is sought; also, any declaratory decree, judgment or order given or made in pursuance of this chapter may be given or made by way of anticipation with respect to any act not yet done or any event which has not yet happened, and in such case the said decree,

judgment or order shall have the same binding effect with respect to that future act or event, and the rights or liability to arise therefrom, as if that act or event had already been done or had already happened before the said decree, judgment or order was given or made.

History.—§5, ch. 21820, 1943.

87.06 Review by appeal, etc.—All decrees, judgments or orders under this chapter may be appealed to or reviewed by the supreme court of Florida in the same manner as other decrees, judgments and orders.

History.—§6, ch. 21820, 1943.

* * * * * *

87.10 Parties.—When declaratory relief is sought, all persons may be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings. . . . .

87.11 Construction of law.—This chapter is declared to be substantive and remedial, its purpose is to settle and to afford relief from insecurity and uncertainty with respect to rights, status and other equitable or legal relations, and is to be liberally administered and construed.

History.—§11, ch. 21820, 1943.

87.12 Adequate remedy does not preclude.—The existence of another adequate remedy shall

not preclude a decree, judgment or order for declaratory relief. The circuit court may order a speedy hearing of an action for a declaratory decree, judgment or order and may advance it on the calendar. When a suit for declaratory decree is filed as provided in this chapter the court shall have power to give as full and complete equitable relief as it would have had if such proceeding had been instituted as a suit in equity.

History.—§12, ch. 21820, 1943; ch. 29737, 1955.

87.13 "Person" defined.—The word "person" wherever used in this chapter shall be construed to mean any person, partnership, joint stock company, unincorporated association or society, or municipal or other corporation of any character whatsoever.

History.—§13, ch. 21820, 1943.

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IN THE

Supreme Court of the United States

October Term, 1963

No. 246

S. ROBERT TRALINS, for himself and
"PLEASURE WAS MY BUSINESS"
as a book,

Petitioner,

vs.

RICHARD E. GERSTEIN, as State Attorney,

Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT

This Court Has Jurisdiction In the Instant Case as The Florida District Court of Appeal, which Properly Assumed Jurisdiction Below, Is the Highest State Court in which a Decision May Be Had.

Respondent's Brief,[1] pp. 2-4, apparently challenges petitioner's appeal to the Florida District Court of Appeal—a rather unusual time for raising such issue, and

[1]The following symbols will be used: "P" for Petition for a Writ of Certiorari . . . "PA" for Appendix attached to Petition, "R" for Respondent's Brief, and "RA" for Respondent's Appendix.

a novel attempt to deprive this Court of jurisdiction herein.

Suffice to say that the Supreme Court of Florida has no jurisdiction to hear a direct appeal herein from the trial court under Art. V, sec. 4(2) of the Fla. Const. since the trial court did *not* directly pass upon the validity of a state statute nor construe any controlling provision of the state or Federal Constitution.

"*Applying* the test laid down by our Appellate Courts and by the Florida Statutes," i.e., the test set forth in *Roth* v. *United States*, 347 US 476, 77 S. Ct. 1304, 1 L Ed. 2d. 1498, and Fla. Stats. sec. 847.011, Laws of Florida, 1961, Ch. 61-7, sec. 10, the trial court found "Pleasure Was My Business" obscene (A. 8, emphasis added). Indeed the Florida District Court of Appeal specifically quoted in its opinion the trial court's language set forth above, noting that the statutory test applied was based on the *Roth* case and had been upheld in Florida previously in *Rachleff* v. *Mahon*, Fla. 1960, 124 So. 2d. 878, inter alia. (P.A. 12-13).

The entire tenor of both courts' opinions demonstrates their awareness that the only question involved was the *application* of the statutory obscenity test to the book in question. The appellate court concluded its opinion as follows:

> " . . . the trier of fact, in this instance the trial court, examining the evidence as whole, *applied* the proper test and concluded that the the subject book was obscene. There is nothing

in this record that would cause us to disagree with its conclusion." (P.A. 14)

In the pending "Florida Tropic-of-Cancer" Case, the trial court held the book obscene and banned it, after which appellant appealed to the same Florida District Court involved in the instant case. Appellant originally *attacked the validity and constitutionality* of the Florida obscenity statute but later withdrew such ground of appeal, challenging only the *application* of the statute to the book. The Florida District Court on its own motion transferred the appeal to the Supreme Court of Florida *Grove Press Inc.* v. *Gerstein* (Fla. App. 1963) 152 So. 2d 177. The Florida Supreme Court held that it had *no* jurisdiction and returned the case to the appellate court. *Grove Press, Inc.* v. *State of Florida ex rel Richard E. Gerstein*, Fla. May 31, 1963, ____So. 2d.____.[2]

Since no direct appeal from the trial court to the Florida Supreme Court was permissible, the appellate court properly rendered its decision under Art. V. sec. 5(3) of the Florida Constitution.

Nor could petitioner have appealed to the Florida Supreme Court *after* the appellate court's affirmance of judgment below as said court's appellate jurisdiction is "in substantial measure *final*", *Karlin* v. *City of Miami Beach*, Fla. 1959, 113 So. 2d 551, 552 (emphasis added), and prevails except where the Fla. Supreme Court has appellate or certiorari review power, 5 Fla. Jur., *Certiorari*, sec. 6.1 in 1962 Supp. p. 42.

[2]The Florida District Court of Appeal heard oral argument in the Tropic-of-Cancer case on July 11, 1963 and has not as yet rendered any decision therein.

The exception is not applicable herein as the appellate court did not intitally pass upon the validity of a state statute, initially construe any controlling constitutional provision (appeal grounds), nor render a decision affecting state officers, involving a certified question, or conflicting with other appellate decisions (certiorari grounds), Art. V, sec. 4(2) of the Fla. Const. It should be noted that "construction" of a controlling constitutional provision requires explaining or defining rather than merely applying said provision. *Armstrong* v. *City of Tampa*, Fla. 1958, 106 So. 2d. 407, 409.

Petitioner submits that the Florida Supreme Court now has *no* common-law power of certiorari apart from the constitutional bases discussed above, *Robinson* v. *State of Florida*, Fla. 1961, 132 So. 2d. 3, 5; *Karlin* v. *City of Miami Beach*, Fla. 1959, 113 So. 2d. 551, 552, 5 Fla. Jur., *Certiorari*, sec. 6.1 in 1962 Supp. pp. 42-44; but the continued existence of such a power is irrelevant since it never provided a *full review* of the case involved, was *limited* to determining whether or not the lower court exceeded its jurisdiction or proceeded contrary to essential legal requirements (a determination *not* sought by petitioner now or before in this case), and therefore cannot deprive this Court of jurisdiction. *Dresner* v. *City of Tallahassee*, cert. granted, — U.S. —, — S. Ct. —, — L Ed. 2d. —, 31 LW 3338.

As neither the trial court nor the appellate court ever (1) passed upon the validity of the Florida obscenity statute or (2) construed any controlling constitutional provision, petitioner was unable to have the Florida Supreme Court review the case at bar by direct appeal, indirect appeal, or certiorari. The Florida District Court

of Appeal properly assumed jurisdiction and the decision rendered by said court is the *ultimate* decision available to petitioner in the courts of Florida.

CONCLUSION

For the foregoing reasons, Petitioner submits that this Court has jurisdiction of the instant case under 28 USC sec. 1257 as the Florida District Court of Appeal is the highest state court capable of rendering a decision herein, which decision involves a deprivation of federal constitutional rights and should be reviewed by this court by a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, RICHARD YALE FEDER, Counsel for Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on_____, 1963, I served copies of the foregoing Petition for Writ of Certorari on the Respondent and on cross-appellant below by mailing a copy thereof in a duly addressed envelope with postage prepaid to each of following, to wit, GLENN C. MINCER, Assistant State Attorney, State Attorney's Office, Dade County Courthouse, Miami, Florida, and on N. JOSEPH DURANT, JR., Assistant State Attorney, State Attorney's Office. Dade County Courthouse, Miami, Florida, and to HONORABLE RICHARD W. ERVIN, Attorney-General of Florida, Tallahassee, Florida (air mail postage prepaid), and to HERBERT P. BENN AND LEONARD R. MELLON, Assistant Attorneys General, Miami, Florida, attorneys for Respondent, and JOSEPH P. DURANT, Seybold Building, Miami 32, Florida; and to DANIEL L. GINSBERG, 566 N. E. 15th Street, Miami, Florida, attorney for cross-appellant below.

_____

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